9-1-2015

Sallaz v. Rice Appellant's Brief Dckt. 42698

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Attorneys for Defendants/Counterclaimants-Respondents

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS SALLAZ,

Plaintiff-Appellant

MARCY FOX,

Involuntary Plaintiff,

vs.

EUGENE RICE and JANET RICE, husband and wife,

Defendants-Respondents,

EUGENE RICE and JANET RICE, husband and wife,

Counterclaimants

vs.

DENNIS SALLAZ an individual and in his representative capacity of SALLAZ AND GATEWOOD Chtd. and SALLAZ AND GATEWOOD, Chtd., Inc., an Idaho Corporation,

Counterdefendants.

Supreme Court Docket No. 42698
Ada County Case No. CV OC 1107253

MOTION TO STAY APPEAL

DENNIS SALLAZ in his representative capacity of SALLAZ AND GATEWOOD Chtd. and SALLAZ AND GATEWOOD, Chtd., Inc., an Idaho Corporation,

Third Party Plaintiffs,

vs.

EUGENE (Roy) RICE and JANET RICE, husband and wife,

Third Party Defendants.

COMES NOW Defendant/Counterclaimant-Respondent Janet Rice, by and through her counsel of record, J. Kahle Becker, pursuant to I.A.R. 13.2 and 13(g), and files her *Motion to Stay Appeal*. This Motion is based upon the *Brief in Support of Motion to Stay Appeal*, the *Affidavit of J. Kahle Becker in Support* thereof, and the record in this case.

Wherefore, Janet Rice asks this Court to:

1) Stay the appeal of this case; and

2) Allow Janet Rice the opportunity to seek to amend the judgment rendered herein upon the resolution of Canyon County Case No. CV 09-11855.

3) Allow Janet Rice the opportunity to file a cross appeal herein upon the resolution of Canyon County Case No. CV 09-11855.

DATED this 1 day of October 2015.

By: _____
J. KAHLE BECKER
Attorney for
Defendants / Counterclaimants / Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1 day of October 2015, a true and correct copy of the foregoing **MOTION TO STAY APPEAL** was served upon opposing counsel as follows:

William Fuhrman Jones Gledhill Fuhrman & Gourley 225 N. 9th St., Ste 820 P.O. Box 1097 Boise, ID 83701	_____ Email _____ Personal Delivery __X__ Facsimile
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IN THE SUPREME COURT OF THE STATE OF IDAHO

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MARCY FOX,

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Third Party Plaintiffs,

vs.

EUGENE (Roy) RICE and JANET RICE, husband and wife,

Third Party Defendants.

COMES NOW Defendant/Counterclaimant-Respondent Janet Rice, by and through her counsel of record, J. Kahle Becker, pursuant I.A.R. 13.2 and 13(g), and files her *Brief in Support of Motion to Stay Appeal* as follows:

INTRODUCTION

On September 25, 2015, the Supreme Court issued its decision in Docket No. 42161, *Rice v. Sallaz & Real Homes, LLC et al.*, Appeal from Canyon County Case No. CV 09-11855. Footnote 13 on page 11 of said *Opinion* states:

> In their brief on appeal, Respondents state that they were asserting claims against Sallaz, personally, for legal malpractice and breach of fiduciary duty in connection with the Real Homes, Real Properties transaction in Ada County Case No. CV0C-2011-7253. The Court notes that on July 21, 2014, an Ada County jury found that Sallaz had acted as the Rices' attorney in that transaction, had committed legal malpractice, and had breached his fiduciary duty, but assessed damages at zero. That case has been appealed to this Court and is currently pending as Docket No. 42698.

Exhibit 1 to *Affidavit of J. Kahle Becker in Support of Motion to Stay Appeal.*

The case (Docket No. 42161) was then remanded for further proceedings before the District Court in Canyon County, as Case No. CV 09-11855. Janet Rice asks that this Court stay the appeal of this case until such time as Canyon County Case No. CV 09-11855 (*Rice v. Sallaz & Real Homes, LLC et al*) is fully adjudicated. Mrs. Rice asks for this relief so that that the

damages, if any, arising from Dennis Sallaz' legal malpractice in connection with the Real Homes/Real Properties transaction may be calculated and utilized in proceedings in connection with the appeal and/or amending the judgment rendered herein.

LEGAL ARGUMENT

The *Amended Judgment*, dated October 15, 2014, states:

> The Rices' other counterclaims against Sallaz are dismissed with prejudice, with no award to the Rices....The Rices' counterclaims against Counterdefendants Sallaz and Gatewood Chtd., Sallaz and Gatewood Chtd., Inc., Sallaz and Gatewood Law Offices, PLLC, and Sallaz Law, Chtd., Inc. are dismissed with prejudice, with no award to the Rices.
>
> October 15, 2014 *Amended Judgment* at 2-3.

The relief Janet Rice seeks, while admittedly extraordinary, is specifically contemplated under Idaho Rule of Civil Procedure Rule 60(b). Idaho Rule of Civil Procedure 60(b) provides:

> **60(b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, Grounds for Relief From Judgment on Order.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; **(5)** the judgment has been satisfied, released, or discharged, **or a prior judgment upon which it is based has been reversed or otherwise vacated**, or it is no longer equitable that the judgment should have prospective application; **or (6) any other reason justifying relief from the operation of the judgment.** The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Such motion does not require leave from the Supreme Court, or the district court, as the case may be, as though the judgment has been affirmed or settled upon appeal to that court. This rule does not limit the power of a court to: (i) entertain an independent action to relieve a party from a judgment, order or proceeding, or (ii) to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against a party who was not personally served with summons and complaint either in the state of Idaho or in any other jurisdiction,

> and who has failed to appear in said action, or (iii) to set aside a judgment for fraud upon the court.
>
> I.R.C.P. 60(b) (Emphasis added).

In this case, the Jury's finding that Dennis Sallaz committed legal malpractice in connection with his representation of the Rices in the Real Homes/Real Properties transaction and also finding the Rices did not suffer any damages as a result therefrom, is based upon Defendant's arguments about the results of the Canyon County Case. *See* Trial Transcript pages 749-756, 785-792, 894-901, 1861-1868, attached as Exhibit 2 to *Affidavit of J. Kahle Becker in Support of Motion to Stay Appeal.* That case has since been remanded to the District Court in Canyon County. Exhibit 1 to *Id.*

Courts have regularly provided parties relief from judgments under similar circumstances.

> Thus the weight of authority supports the view that, on an appeal from a judgment in part based on a plea of estoppel by judgment, the appellate court may take judicial notice of its reversal of the judgment relied on as an estoppel, subsequent to the rendition of the judgment in the court below, and reverse the judgment in consequence thereof.
>
> 81 A.L.R. 712 (Originally published in 1932).[1]

[1] In *Butler v. Eaton* (1891) 141 U.S. 240, 35 L. ed. 713, 11 S. Ct. 985, the Supreme Court, without going through the form of remanding the cause, reversed the judgment in the second cause, holding that, where a judgment of the circuit court is based wholly on a judgment of a state court between substantially the same parties and on the same subject-matter, which latter judgment is afterwards reversed in the Supreme Court, and the case in the circuit court is subsequently brought there for review, the judgment in it will also be reversed although the record shows no error. In justification of the action so taken the court says: "As the sole ground and reason for giving judgment against the receiver ... was the judgment of the supreme judicial court of Massachusetts, which (as stated) we have just reversed, the inquiry arises; What disposition may be made of the judgment in this case, supposing that the evidence of the Massachusetts judgment was properly admitted and allowed by the circuit court on the trial of the cause? At that time this judgment was valid and subsisting ... . We think ... that the evidence of the judgment recovered was properly admitted as a bar ... . And it cannot be said, therefore, looking to the record in this case alone, that there is error in the judgment now before us. But, by our own judgment just rendered in the other case, the whole basis and foundation of the defense in the present case, namely, the judgment of the supreme judicial court of Massachusetts, is subverted and rendered null and void for the purpose of any such defense. Whilst in force, an execution issued upon it, and a sale of property under such execution, would have been effective. And when it was given in evidence in this case it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. Are we then bound to affirm the judgment and send it back for ulterior proceedings in the court below, or may we, having the judgment before us, and under our control for affirmance, reversal, or modification, and having judicial knowledge of the total present insufficiency of the ground which supports it, set it aside as devoid of any legal basis,

The Court in Tsakonites v. Transpacific Carriers Corp., 322 F. Supp. 722, 725 (S.D.N.Y. 1970) was faced with a similar situation in which a Plaintiff was denied relief in one case based on grounds which were subsequently overruled by a higher court in a separate case:

> Plaintiff claims that it is clear, as it certainly seems to be from the face of the Supreme Court's opinion, that the Supreme Court has overruled the rationale on which the instant case was originally dismissed by Judge Cooper, who was then affirmed by the Court of Appeals for this Circuit. He contends that he should now be entitled to his day in court to establish that his case falls within the Rhoditis doctrine, as his allegations appear, on their face, to establish. He therefore asks that the previous judgment of dismissal of the suit be vacated under Rule 60(b)(5), (6), which provides...I believe it to be in the interest of justice in the exceptional circumstances of this case to grant Tsakonites his day in court now that the Supreme Court appears to have overruled the previous decisions against him. Accordingly, the motion to vacate the judgment of March 23, 1965 is granted.
>
> Tsakonites v. Transpacific Carriers Corp., 322 F. Supp. 722, 723-725 (S.D.N.Y. 1970).

Courts have also provided parties relief from a judgment in similar circumstances under the "catchall provision" of FRCP 60(b)(6) which is identical to IRCP60(b)(6):

> A case presented extraordinary circumstances entitling plaintiffs to relief from judgment in diversity action because, during the first appeal to the court of appeals the state supreme court settled a question of law adversely to plaintiffs, but during remand from the court of appeals on an unrelated issue, the state court reversed itself, with the result that the district court was clearly in error on the question of state law. *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 2 Fed. R. Serv. 3d 977 (6th Cir. 1985).
>
> Defendants who were found liable on a note in a diversity action were entitled to relief from a final judgment because of extraordinary circumstances, since the state supreme court subsequently overruled the law the federal court had relied

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and give such judgment in the case as would and ought to be rendered upon a writ of error coram vobis, audita querela, or other proper proceedings for revoking a judgment which has become invalid from some extraneous matter? ... The judgment complained of is based directly upon the judgment of the supreme judicial court of Massachusetts which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object? Upon full consideration of the matter we have come to the conclusion that we may dispose of the case here." 81 A.L.R. 712 (Originally published in 1932)

> upon in a case arising out of the same occurrence; federal and state actions arising out of the same occurrence should render substantially the same results. *First American Nat. Bank of Nashville v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D. Ky. 1986).
>
> 47 Am. Jur. 2d Judgments § 706

It is also conceivable that other legal effects may flow from the decision following remand, such as the date upon which the statute of limitations began to run and Dennis Sallaz' fraud upon the court. *See* decision in Docket No. 42161, *Rice v. Sallaz & Real Homes, LLC et al.* Footnote 7 at 5.

> In that appeal, Sallaz did not challenge the findings of fact and conclusions of law regarding the division of community property and indebtedness. Rather, he raised a specious claim that there had never been a valid marriage between the two, in spite of the fact that he had never previously raised the issue in the divorce action and had, indeed, sworn under oath that the parties were married.
>
> Id. at 347, 336 P.3d at 280.

Thus, the appropriate course of action is to stay the appeal of this case until such time as Canyon County Case No. CV 09-11855 has been fully adjudicated.

I.A.R. 13(g) provides:

> **(g) Stay by Supreme Court.** The Supreme Court may also, in its discretion, enter an order staying a proposed act, a pending action or proceeding, or the enforcement of any judgment, order or decree, including but not limited to an injunction, writ of mandamus or prohibition, at any time during the pendency of an original application or petition for any extraordinary writ, or during the pendency of any appeal or a motion for certification of appeal. Any order of the Supreme Court shall take precedence over any order entered by the district court or administrative agency. **Provided, in any appeal from the district court or an administrative agency, a party desiring to obtain any such stay must first make application to the district court or administrative agency before making application to the Supreme Court.** If a district court or administrative agency denies an application for stay, or fails to act upon the application within fourteen (14) days after the filing of the application, any party may apply to the Supreme Court for a stay. If a district court or administrative agency grants a stay, any party may apply to the Supreme Court to modify or vacate the stay.
>
> I.A.R. 13(g) (Emphasis added).

Due to the language in IAR 13(g) and out of an abundance of caution, a motion to stay this appeal was also filed with the District Court. On September 30, 2015 an administrator from the Supreme Court called the office of the undersigned and stated that a motion to stay should be filed with the Supreme Court. I.A.R 13.2 provides:

> [P]roceedings in an appeal before the Supreme Court may be suspended only by order of the Supreme Court on motion showing good cause. An order suspending an appeal will state the duration and any conditions of such suspension, which may be terminated or extended by further order of the court upon application of any party or upon the initiative of the Court.

I.A.R. 13.2.

Respondent Janet Rice hereby moves the Idaho Supreme Court to stay this appeal based on the foregoing legal argument.

CONCLUSION

Wherefore, Janet Rice asks this Court to stay the appeal of this case and allow Janet Rice the opportunity to seek to amend the judgment rendered herein or file a cross appeal upon the resolution of Canyon County Case No. CV 09-11855.

DATED this 1 day of October 2015.

By: _____
J. KAHLE BECKER
Attorney for
Defendants / Counterclaimants / Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16 day of October 2015, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION TO STAY APPEAL** was served upon opposing counsel as follows:

William Fuhrman Jones Gledhill Fuhrman & Gourley 225 N. 9th St., Ste 820 P.O. Box 1097 Boise, ID 83701	_____ Email _____ Personal Delivery __X__ Facsimile
V.K. Smith 1900 W. Main Boise, ID 83702	_____ Email _____ Personal Delivery __X___ Facsimile
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Attorneys for Defendants/Counterclaimants-Respondents

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS SALLAZ,

Plaintiff-Appellant

MARCY FOX,

Involuntary Plaintiff,

vs.

EUGENE RICE and JANET RICE, husband and wife,

Defendants-Respondents,

EUGENE RICE and JANET RICE, husband and wife,

Counterclaimants

vs.

DENNIS SALLAZ an individual and in his representative capacity of SALLAZ AND GATEWOOD Chtd. and SALLAZ AND GATEWOOD, Chtd., Inc., an Idaho Corporation,

Counterdefendants.

Supreme Court Docket No. 42698
Ada County Case No. CV OC 1107253

AFFIDAVIT OF J. KAHLE BECKER IN SUPPORT OF MOTION TO STAY APPEAL

DENNIS SALLAZ in his representative capacity of SALLAZ AND GATEWOOD Chtd. and SALLAZ AND GATEWOOD, Chtd., Inc., an Idaho Corporation,

Third Party Plaintiffs,

vs.

EUGENE (Roy) RICE and JANET RICE, husband and wife,

Third Party Defendants.

STATE OF IDAHO)
:ss
County of Ada)

COMES NOW, J. Kahle Becker, being over the age of eighteen years and competent to make this Affidavit, after first being duly sworn, and upon his own personal knowledge, states as follows:

1. That I am an attorney in good standing with the Idaho State Bar and the attorney for Defendants/Counterclaimants/Respondents in the above referenced case.
2. That I make this Affidavit in support of *Motion to Stay Appeal.*
3. Attached as Exhibit 1 is a true and correct copy of the Supreme Court *Opinion* in Docket No. 42161 *Rice v. Sallaz & Real Homes, LLC et al.*, Appeal from Canyon County Case No. CV 09-11855, dated September 25, 2015.
4. Attached as Exhibit 2 is a true and correct copy of the Trial Transcript, pages pp. 749-756, 785-792, 894-901, 1861-1868, for the dates of July 8, 2014, July 9, 2014, and July 17, 2014.

Further your affiant sayeth naught.

DATED this 1 day of October 2015.

By: _____
J. KAHLE BECKER
Attorney for
Defendants / Counterclaimants / Respondents

STATE OF IDAHO)
:ss
County of Ada)

SUBSCRIBED AND SWORN unto me this 1st day of October, 2015.

THOMAS J. WIGGS NOTARY PUBLIC STATE OF IDAHO

_____
Notary Public for the State of Idaho
Residing at: Boise, Idaho
My Commission Expires:
07-19-2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1 day of October 2015, a true and correct copy of the foregoing **AFFIDAVIT OF J. KAHLE BECKER IN SUPPORT OF MOTION TO STAY APPEAL** was served upon opposing counsel as follows:

William Fuhrman Jones Gledhill Fuhrman & Gourley 225 N. 9th St., Ste 820 P.O. Box 1097 Boise, ID 83701	_____ Email _____ Personal Delivery __X__ Facsimile
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James B. Lynch Special Master 2047 Blaine Way Boise, ID 83702	_____ US Mail _____ Personal Delivery __X__ Facsimile

J. KAHLE BECKER
Attorney for
Defendants/Counterclaimants/Respondents

Exhibit 1

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket 42161

JANET RICE, individually, and as successor in interest of EUGENE RICE, deceased, and REAL PROPERTIES, LLC, an Idaho limited liability company, Plaintiffs-Counterdefendants-Respondents, v. DENNIS SALLAZ and REAL HOMES, LLC, an Idaho limited liability company, Defendants-Appellants, and GLENN TREFREN and TRADESMAN CONTRACTORS AND CONSTRUCTION, LLC, an Idaho limited liability company, Defendants-Counterclaimants-Appellants.	Boise, September 2015 Term 2015 Opinion No. 96 Filed: September 25, 2015 Stephen W. Kenyon, Clerk

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

The judgment of the district court is affirmed in part and vacated in part, and the case is remanded.

Vernon K. Smith, Boise, for appellants.

J. Kahle Becker, Boise, for respondents.

J. JONES, Chief Justice

Defendant Dennis Sallaz and Defendants/Counterclaimants Glenn Trefren and Tradesman Contractors and Construction, LLC, (collectively "Appellants") appeal the district

court's holding they could not recover breach of contract damages or obtain equitable relief for the failure of Plaintiff/Counterdefendant Real Properties, LLC, to pay the full purchase price under an agreement for the sale and purchase of Real Homes, LLC. Although the district court found that the contract between Sallaz and Trefren, as sellers, and Real Properties, as buyer, was valid, it held that Real Properties' performance of the contract was excused because of a material breach by the sellers. The Court held that equitable relief was not available because of the existence of the contract.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Dennis Sallaz and Renee Baird married in 1996. After having separated in the fall of 2003, they divorced on July 28, 2005. The property and debt issues were hotly contested, tried before the court on four separate occasions between November of 2005 and July of 2006, and determined in a written decision entered on October 30, 2007. Among the assets at issue in the divorce trial were Real Homes, LLC, and the real property thought to be owned by that entity. Sallaz and Baird presented conflicting evidence, including different forms of the operating agreement and various other documents, that made it unclear who had an ownership interest in Real Homes.

The original articles of organization for Real Homes were filed on January 19, 2001, listing Sallaz as the registered agent and Baird as the manager. In 2003, Sallaz filed amended and restated articles of organization, listing himself as a member and signing the document as "owner." An operating agreement introduced into evidence by Baird, signed and dated January 19, 2001, provided that she was the 100% owner of Real Homes. Another version offered by Sallaz provided that he owned 50% of Real Homes with the other 50% being owned by Glenn Trefren, each purportedly having contributed $25,000 in value.[1] This document was signed by both Sallaz and Trefren but included no date on the signature page or otherwise. With the exceptions of the names of initial contributors and the signatures, the operating agreements provided by Sallaz and by Baird were essentially identical. Both versions provided that Real Homes would dissolve upon the occurrence of any of a number of specified events, including the "sale of all or substantially all of the LLC's assets."

[1] The judge in the divorce case found that "[t]he evidence at trial established that Mr. Trefren did not make such a contribution."

In February 2001, Real Homes purchased five acres of land and divided it into four lots referred to as lots 1A, 1B, 2A, and 2B. Real Homes purchased interests in two additional lots in 2002, referred to by the parties as the Smith Property. In 2004, Lot 1B was transferred from Real Homes to Sallaz and Baird as individuals, and Baird began to reside in a home on that lot after she and Sallaz separated. On February 16, 2005, Trefren, purportedly acting as a member of Real Homes, executed a quitclaim deed to grant all real property owned by Real Homes to Tradesman, his own LLC. This deed purported to include the transfer of Lot 1B to Tradesman, even though that lot had apparently already been transferred to Baird in 2004.[2]

Sallaz is an attorney and was the long-time counsel for plaintiffs, Eugene and Janet Rice and their LLC, Real Properties.[3] On January 4, 2006, Sallaz formed Real Properties for the Rices. Two days later, on January 6, 2006, Sallaz and Trefren entered into a contract with Real Properties titled "Purchase Agreement for Sale of Interest in Real Homes, LLC." This contract identified Trefren and Sallaz as "Seller" and Real Properties as "Buyer." The agreement recited that it was purportedly for the sale to Real Properties of (1) 100% of the ownership interest in Real Homes from Trefren and Sallaz as individuals, and (2) "all right, title and interest in and to all real property owned by Real Homes, LLC as set forth on Exhibit A attached hereto." Attachment A to the agreement described the four lots (1A, 1B, 2A, and 2B) purchased by Real Homes in 2001 as well as the Smith Property.[4] The contract was signed by Sallaz as an individual "Co-Owner," Trefren as an individual "Co-Owner," and Trefren as a "Co-Owner" on behalf of Real Homes. Eugene Rice signed as manager of Real Properties. In exchange for 100% of the interest in Real Homes, Real Properties was to pay $250,000 in the manner specified in the agreement. The Rices paid from their personal funds approximately $68,000 of the purchase price.

Under the agreement, Sallaz and Trefren warranted among other things that: (1) they owned 100% of Real Homes; (2) they "have good and marketable title to said Ownership Interest

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[2] With respect to this particular parcel, on February 27, 2009, Sallaz in his individual capacity quitclaimed his interest in Lot 1B to Real Homes. Also acting in his individual capacity, Sallaz quitclaimed his interest in Lot 1B to Baird on March 2, 2009.

[3] Eugene Rice is now deceased.

[4] As noted above, at the time the purchase agreement was entered into, Real Homes did not own any real property, the same having been deeded to Tradesman by Trefren on February 16, 2005. In their opening brief on appeal, Appellants assert that Mr. Trefren was concerned about Baird's dealings with the assets of Real Homes and that "he proposed, and Dennis Sallaz agreed, to have the assets of Real Homes transferred to Tradesman . . . which action put those assets out of Baird's reach."

being sold and transferred hereunder with absolute right to sell, assign and transfer same to Buyer free and clear of all liens, pledges, security interests or encumbrances and without any breach of any agreement to which he is a party;" (3) "all real properties owned by Real Homes, LLC, and being transferred herein are free and clear of all encumbrances;" and (4) "Real Homes, LLC has free and clear title to [the described] real properties and Sellers shall execute any and all documents requested by Buyer to transfer all interest therein to Buyer." On March 2, 2006, Trefren recorded four separate quitclaim deeds dated January 6, 2006. The first purported to convey Lots 1A, 2A, and 2B from Tradesman to Real Properties. The second purported to also convey Lots 1A, 2A, and 2B from Real Homes to Real Properties. The third purported to convey the Smith Property from Tradesman to Real Properties. The fourth purported to also convey the Smith Property from Real Homes to Real Properties. The purchase and sale agreement was not disclosed to Baird until April 2006, at the divorce trial. On March 6 and 10, 2006, respectively, Sallaz assigned his interest in the purchase and sale agreement to an attorney representing him in another case in the amount due that attorney and to Trefren in any remaining amount owing Sallaz under the agreement.

Following trial, the judge hearing the divorce case found that the version of the operating agreement offered by Baird was the original operating agreement for Real Homes, meaning that she was the 100% owner at the time of formation. The court further found that Baird's full ownership meant that any changes to the operating agreement without her approval were void and that she, therefore, retained her 100% interest in Real Homes, including all its assets and liabilities. These assets were thought to include Lots 1A, 2A, 2B, and the Smith Property. The divorce judge also noted that there were potential third-party claims to Real Homes and its assets but that the court could not rule on those claims in the divorce action.

The Rices, Real Properties and Real Homes brought the current action against Baird, Sallaz, Trefren, and Tradesman,[3] seeking among other things: (1) to declare the validity of the

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[3] In their brief, Respondents contend that Sallaz, their personal attorney, urged the Rices to bring this action against him in order to quiet title to the property that Real Homes purportedly sold to Real Properties. According to Respondents, "[t]his case was initiated by the Rices and Real Properties, LLC at the request and direction of Dennis Sallaz and his assignee, Glenn Trefren." As support for this contention, Respondents cite to a letter in the record written by Sallaz to plaintiffs' former counsel, the attorney who filed this action against Sallaz, Trefren, and Tradesman, advising that "[b]oth Trefren and myself are willing and supporting Defendants and stand ready to participate to the max." For his part, Sallaz contended that he and the Rices "were the best of friends jointly suing my ex-wife, Renae Baird, to quiet title on the Real Homes, LLC properties." He also said that he "was still Rice's best and only friend and attorney up to 2011," and that "[i]t was I, who after many conversations with Rice about the

purchase and sale agreement; (2) to quiet title in the subject real property in Real Properties; (3) unjust enrichment damages; and (4) damages for breach of the purchase and sale agreement. By the time of trial, plaintiffs' only remaining claim was count 5, alleging breach of the purchase and sale agreement.[6] Baird had been removed as a defendant after the Rices agreed not to pursue any claim they may have had against Lot 1B where Baird had been living. Sallaz filed an answer with a number of affirmative defenses. Trefren and Tradesman filed an answer asserting a three-count counterclaim. The district court held a bench trial on Real Properties' breach of contract claim and Trefren's and Tradesman's counterclaims.

The district court found that Real Properties' count 5 sought damages for Sallaz' and Trefren's alleged breach of warranties in the agreement that they had good and marketable title to the membership interests in Real Homes and the absolute right to transfer those interests. This alleged breach was primarily premised on Real Properties' argument that Baird had a 100% ownership interest in Real Homes, as found by the court in the divorce action. The defendants moved to dismiss count 5, arguing Real Properties failed to prove that Baird was a member of Real Homes at the time of the agreement. The district court granted defendants' motion, finding, contrary to the decision in the divorce case, that the operating agreement offered by Sallaz showing that he and Trefren were the 50/50 owners of Real Homes represented the actual ownership interests in that entity.[7]

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necessary quiet title action, recommended that we engage my attorney . . . to represent all three of us in the Real Homes, LLC property sale and purchase and quiet title action." He contended, however, that the attorney who filed the complaint recommended that Sallaz and Trefren be designated as defendants, rather than plaintiffs, contrary to *Sallaz'* original concept.

[6] As written, count 5 in the complaint was brought as an alternative claim, premised on a situation where the court would find "the purchase and sale agreement invalid or unenforceable." Count 5 designated Real Homes as a defendant, whereas it had been a plaintiff for the declaratory and quiet title claims. The trial court found that count 5 should have been premised on the court finding the purchase and sale agreement was "valid and enforceable," because the claim is based on a breach of that agreement. The parties do not appeal this finding and we will not disturb it.

[7] The district court made this finding in its memorandum decision entered on February 28, 2014. The court could not have known at the time that this Court would enter a final decision in the Baird/Sallaz divorce case six months later, affirming the district court's intermediate appellate decision affirming the magistrate judge's findings of fact, conclusions of law, and decision in the divorce action. *Sallaz v. Sallaz*, 157 Idaho 342, 336 P.3d 275 (2014). In that appeal, Sallaz did not challenge the findings of fact and conclusions of law regarding the division of community property and indebtedness. Rather, he raised a specious claim that there had never been a valid marriage between the two, in spite of the fact that he had never previously raised the issue in the divorce action and had, indeed, sworn under oath that the parties were married. *Id.* at 347, 336 P.3d at 280. In their opening brief on appeal in this case, the Appellants grudgingly acknowledged the Court's decision in the divorce case, saying "the Idaho Supreme Court upheld the existence of that marriage, including the community property interests that Ms. Baird derived from her 'ownership' of Real Homes, on what can only be characterized as a pseudo-common law basis."

In count 1 of the counterclaim, Trefren claimed Real Properties breached the purchase and sale agreement by failing to pay the agreed amount of $250,000. The district court agreed that Real Properties breached the agreement but also found that Real Properties was excused from performance because a material breach by defendants defeated the fundamental purpose of the contract. The court found that Real Homes had sold all or substantially all of its assets upon the execution of the purchase and sale agreement, which required the LLC to be wound up under the terms of its operating agreement. It further found that Idaho law does not authorize the transfer of interests in the winding up of an LLC. The court reasoned that because the transfer of the ownership interest was not authorized under Idaho law, the defendants breached the covenant that they had the "absolute right to sell, assign and transfer the same to Buyer … without any breach of any agreement to which" they were a party and, in fact, were not authorized to transfer their member interests in Real Homes to Real Properties. The court, therefore, dismissed count 1. However, the court found that the transfer of the ownership interests in Real Homes took place as a factual matter, despite being unauthorized, meaning Real Properties had control of Real Homes after the agreement was executed.

In count 3 of the counterclaim, Trefren and Tradesman claimed they were entitled to recover for unjust enrichment if they could not recover damages for Real Properties' breach of the purchase and sale agreement. The district court determined that Trefren and Tradesman could not pursue equitable relief because of the existence of a valid contract. The district court dismissed count 2 and that ruling has not been appealed. Following the district court's decision, the defendants filed a motion for reconsideration, which was denied. They filed a timely appeal.

II.
ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in holding that Real Properties' performance of the purchase agreement was excused.
2. Whether the district court erred in dismissing Counterclaimants' unjust enrichment claim.
3. Whether an award of attorney fees to any party is appropriate.

III.
STANDARD OF REVIEW

When reviewing the decision of a trial court following a bench trial, this Court limits its review to "whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *City of Meridian v. Petra Inc.*, 154 Idaho 425, 434–35, 299 P.3d

232, 241–42 (2013) (quoting *Shore v. Peterson*, 146 Idaho 903, 907, 204 P.3d 1114, 1118 (2009)). The Court does not set aside the trial court's findings of fact unless clearly erroneous. *Id.* at 435, 299 P.3d at 242. However, the Court exercises free review over the trial court's conclusions of law and may draw its own legal conclusions from the trial court's findings. *Id.*

The interpretation of an unambiguous contract and whether the terms thereof have been violated are questions of law. *Id.* In an unambiguous contract, its terms must be given their plain and ordinary meaning. *Id.* Whether a valid contract has been formed is generally a question of fact. *Thomas v. Thomas*, 150 Idaho 636, 645, 249 P.3d 829, 838 (2011).

IV.
ANALYSIS

A. The district court erred in dismissing the Counterclaimants' claim for breach of contract.

The district court found the purchase and sale agreement was a valid contract on its face. It found that the express language of that agreement, together with the evidence adduced at trial, showed the obligations of the parties were to (1) transfer 100% of the interests of Sallaz and Trefren in Real Homes to Real Properties in exchange for Real Properties' payment of $250,000, and (2) transfer all real property owned by Real Homes to Real Properties, for which no additional payment was required. The court found Real Properties did not perform its obligation to pay the purchase price as agreed. However, it also found that Real Properties was excused from such performance because Sallaz and Trefren materially breached the agreement by warranting they had the absolute right to sell 100% of their interests in Real Homes when, in fact, Idaho law prevented the transfer of those interests because Real Homes was required by the terms of the transaction to be wound up. Essentially, the court found the execution of the agreement triggered dissolution for Real Homes because it amounted to a sale of all or substantially all of that entity's assets, and Idaho law does not authorize the transfer of ownership interests in the winding up of an LLC.

Sallaz and Trefren argue they did not receive full payment despite performing all of their obligations under the agreement (1) to transfer their interests in Real Homes, and (2) to cause the real property described in the agreement to be transferred to Real Properties. Appellants argue the district court erred in finding the execution of the agreement to be a dissolution event because (1) Real Homes did not transfer any property to Real Properties, as it did not actually own the property at the time of the execution, so the property transfer could not have amounted to the

transfer of all of Real Homes' assets, and (2) a property-development entity such as Real Homes may, in the ordinary course of its business, acquire several properties and then liquidate its assets and this common business practice should not result in an unexpected, involuntary dissolution.[8] Real Properties argues that Real Homes is the only entity that may have had a claim with respect to the real property transferred to Real Properties under the agreement, and Saliaz and Trefren failed to assert any such claims on behalf of Real Homes below.

Once a party to a contract has proven another's breach of that contract, the breaching party has the burden of pleading and proving affirmative defenses that may legally excuse performance. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 747, 9 P.3d 1204, 1213 (2000). "A material breach is more than incidental and touches the fundamental purpose of the contract, defeating the object of the parties entering into the agreement." *Borah v. McCandless*, 147 Idaho 73, 79, 205 P.3d 1209, 1215 (2009). "If a breach of contract is material, the other party's performance is excused." *J.P. Stravens Planning Assocs., Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996) (citing *Ervin Constr. Co. v. Van Orden*, 125 Idaho 695, 700, 874 P.2d 506, 511 (1993)). "[W]hether there was a breach of the terms of a contract is a question of fact. Whether such a breach is material is also a factual question." *Borah*, 147 Idaho at 79, 205 P.3d at 1215 (internal citations omitted).

During the relevant periods, the LLCs in this case were governed by the Idaho Limited Liability Company Act, Idaho Code sections 53-601 through 53-672.[9] The Act provided, "[a] limited liability company is dissolved and its affairs shall be wound up ... upon the occurrence of events specified in writing in the articles of organization or an operating agreement." I.C. § 53-642 (repealed effective 2010). The Act authorized those responsible for winding up an LLC to perform a number of enumerated actions. I.C. § 53-644(2) (repealed effective 2010). This list of actions does not expressly include the authorization to transfer membership interests in the

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[8] Appellants make only very brief argument on this latter point, which is unconvincing. It is the language contained in their own operating agreement that requires dissolution upon the sale of all assets. Therefore, it is unreasonable for them to argue such a sale cannot result in dissolution. They do cite to one case in support of this argument. *Blaine City Title Assoc. v. One Hundred Bldg. Corp.*, 138 Idaho 517, 521, 66 P.3d 221, 225 (2002). However, the page to which they cite shows the Court very generally relying in part on a standard business practice in making its decision. The case does not at all speak to the specific practices at issue here and does not appear to support Appellants' position.

[9] This Act was subsequently replaced by the Idaho Uniform Limited Liability Act, which became effective July 1, 2010. I.C. §§ 30-6-101 *et seq.* In 2015, the Idaho Legislature repealed the Uniform Act, effective July 1, 2017. 2015 Idaho Sess. Laws ch. 243, § 2. No party argues the district court erred in applying the Idaho Limited Liability Company Act.

winding up of an LLC. *See id.*

The district court concluded Real Homes dissolved upon the execution of the agreement because its operating agreement provided that it would dissolve upon the sale of all or *substantially* all its assets, and executing the agreement amounted to such an event. The court therefore found that under Idaho Code section 53-642 this event required Real Homes to be wound up. But the record does not support the district court's conclusion that Real Homes was dissolved by the execution of the purchase and sale agreement. The court's conclusion is problematic for several reasons.

First, the court raised the theory of dissolution *sua sponte*. Evidence was not adduced at trial that was aimed at proving dissolution, nor did either party mention the possibility of dissolution in their written closing arguments.[10] Second, the logical sequence of executing the purchase and sale agreement and the quitclaim deeds makes the sale of the land recited in the agreement superfluous and of no legal effect. The purchase and sale agreement appears to be the document by which the parties intended to transfer the interests in Real Homes to Real Properties. There is not a separate document in the record purporting to officially transfer the ownership interests. At the moment the parties executed that agreement, all equity interest of Salaz and Trefren in Real Homes transferred to Real Properties and, consequently, all assets owned by Real Homes at that time passed to Real Properties, including any real property. Therefore, any recitation or execution of other documents purporting to transfer real property from Real Homes to Real Properties was superfluous. Any such recitation or execution was merely duplicative of the transfer that had already occurred with the transfer of the ownership interests. Once the agreement was signed, neither of its previous owners had any legal authority to transfer any property owned by Real Homes to Real Properties, because they no longer had the power to act on behalf of Real Homes. Third, and most importantly, it is clear that Real Homes no longer owned any of the real property described in the agreement. Real Homes had deeded all of its real property to Tradesman on February 16, 2005. Therefore, there was no actual transfer of any property owned by Real Homes when the agreement was executed, because Real

[10] Although the district court raised the issue *sua sponte*, that problem was not raised by Appellants in their opening brief. When Appellants raised it in their reply brief it was mentioned only in passing and without argument or authority.

Homes owned no property as of that day.[11]

Additionally, even if there had been a dissolution event, the district court erred in concluding that one cannot legally transfer an ownership interest in an LLC after an event of dissolution. In reaching this conclusion, the court relied only on the language of Idaho Code section 53-644, which provided:

> (2) The persons winding up the business or affairs of the limited liability company may, in the name of, and for and on behalf of, the limited liability company:
> (a) Prosecute and defend suits;
> (b) Settle and close the business of the limited liability company;
> (c) Dispose of and transfer the property of the limited liability company;
> (d) Discharge the liabilities of the limited liability company; and
> (e) Distribute to the members any remaining assets of the limited liability company.

I.C. § 53-644 (repealed effective 2010). Nothing in this section indicates that it is an exhaustive list of all actions permitted during the winding up of an LLC. It simply provides a number of actions that are expressly authorized to be taken by the LLC. This section speaks only to those actions that may be taken "in the name of, and for and on behalf of, the limited liability company." *Id.*; *see also Howard v. Perry*, 141 Idaho 139, 143, 106 P.3d 465, 469 (2005). Here, the transaction to sell Sallaz' and Trefren's ownership interests was not an action taken for or on behalf of Real Homes, but was executed by each of them as individuals. Therefore, section 53-644 does not apply.

Because there was no dissolution event of Real Homes in 2006 and because Sallaz and Trefren would not have been prevented from selling their ownership interests regardless,[12] the district court erred in determining Sallaz and Trefren materially breached the purchase agreement

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[11] It is worth noting that Real Homes' transfer of all its property to Tradesman the prior year could have amounted to a dissolution event in 2005. There was testimony at trial regarding various cash amounts held by Real Homes at various times, so it is unclear whether the transfer of all the real property in 2005 would have amounted to substantially all of Real Homes' assets.

[12] Although Trefren and Sallaz were not precluded from transferring their ownership interests in Real Homes, the Court is concerned that Trefren and Sallaz purported to sell those interests while appearing to represent that Real Homes owned several parcels of property—none of which it actually owned. The price Real Properties was willing to pay for Real Homes was presumably based on the value of the property that was to accompany the acquisition. As a practical matter, Real Properties acquired nearly everything it was promised in the agreement—100% ownership of Real Homes and several parcels of property described in the agreement, excepting Lot 1B. However, the purchase agreement represented that Real Homes then owned all of the described real property free and clear of encumbrances and that it would be conveyed to Real Properties by Real Homes, not by Tradesman.

by transferring their interests.

The district court determined that the purchase and sale agreement was valid and that Real Properties had breached the agreement by failing to pay the full purchase price. However, the district court erred in holding that Real Properties' performance was excused and we therefore vacate such holding. Real Properties had asserted twenty-four affirmative defenses in its answer to the counterclaim, including quasi-estoppel, judicial estoppel, impossibility, breach of warranty of marketable title, lack of adequate consideration, intentional misrepresentation and fraud.[5] It appears that some of these defenses were the subject of proof at the trial of this matter before the district court and such defenses will necessarily be the subject of further consideration on remand to the district court.

B. Counterclaimants' "unjust enrichment" claim.

Trefren and Tradesman argue in count 3 of their counterclaim that if they are not entitled to breach of contract damages under count 1 they are entitled to recover on the theory of unjust enrichment. The district court dismissed this claim, reasoning that they could not recover for unjust enrichment where there is an express contract over the same subject matter. The court stated that it could not apply unjust enrichment where there was an enforceable contract, and it reiterated that it had found an enforceable contract in this case.

Count 3 of the counterclaim alleges,

> That as a result of Defendant's transfer of all right, title and interest in and to Real Homes, LLC and all property owned by Real Homes, LLC, and Plaintiff's failure to pay and subsequent breach of the Purchase Sale Agreement, Plaintiff's (sic) have been unjustly enriched as a result thereof, and the contract and all property transfers should be set aside with the parties being returned to their respective pre Purchase Sale Agreement positions.

Based on this language, it appears that one, or possibly both, of the defendants sought rescission of the purchase agreement based on an unjust enrichment theory. However, following trial Trefren moved to amend count 3 "to conform to the evidence presented on the counterclaims." The gist of the motion was to amend count 3 to seek quantum meruit recovery. In its memorandum decision, the district court observed that "Trefren had indicated an intention to

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[5] In their brief on appeal, Respondents state that they were asserting claims against Sallaz, personally, for legal malpractice and breach of fiduciary duty in connection with the Real Homes, Real Properties transaction in Ada County Case No. CV0C-2011-7253. The Court notes that on July 21, 2014, an Ada County jury found that Sallaz had acted as the Rices' attorney in that transaction, had committed legal malpractice, and had breached his fiduciary duty, but assessed damages at zero. That case has been appealed to this Court and is currently pending as Docket No. 42698.

seek "restitution damages, based on unjust enrichment," rather than rescission, and that count 3 was "apparently asserted by Trefren only." However, the thrust of the motion to conform with the evidence was sought to assert a quantum meruit claim. It is not clear whether Trefren intended to abandon the unjust enrichment claim. The district court denied the motion to amend to conform with the evidence, finding,

> even if the implied-in-fact contract remedy applied here, Trefren has not identified evidence in the record demonstrating the reasonable value of the property he provided to Real Properties, LLC or Roy Rice under the alleged contract. In addition, even if the implied-in-fact contract remedy applied here, Trefren has not identified any evidence in the record demonstrating the reasonable value of the property—his interest in Real Homes, LLC—which he provided to Real Properties, LLC or to Roy Rice under the alleged contract.

While the above finding appears to have been directed toward the quantum meruit theory that Trefren wished to pursue, it may also have application to any unjust enrichment claim made by Trefren. *In* order to make a claim for unjust enrichment, a party must show "(1) there was a benefit conferred upon the defendant by the plaintiff, (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof." *Med. Recovery Servs., LLC v. Bonneville Billing and Collections, Inc.*, 157 Idaho 395, 398, 336 P.3d 802, 805 (2014). However, whether or not Trefren presented a valid claim for unjust enrichment at *trial* is a matter for the district court to determine on remand. Remand is necessary with regard to count 3 because the district court premised dismissal of that claim on its holding on count 1—that the purchase contract was not enforceable by virtue of excuse of performance. Because we have vacated that holding, we must necessarily vacate the ground for dismissal of count 3.

In Bates v. Seldin, the Court clarified the law regarding the interplay of unjust enrichment and express contract. 146 Idaho 772, 776–77, 203 P.3d 702, 706–07 (2008). The Court stated:

> Appellants argue that the doctrine of unjust enrichment is inapplicable where a contract exists between the parties. Appellants' analysis, however, is incorrect. An award for unjust enrichment may be proper even though an agreement exists. The existence of an express agreement does not prevent the application of the doctrine of unjust enrichment. Only when the express agreement is enforceable is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract. Once the jury determined that the contract was not enforceable because Appellants had proved an affirmative defense, the jury properly considered Respondents' claim of unjust enrichment.

Id. at 776–77, 203 P.3d at 706–07 (internal citations omitted). Thus, because the availability of unjust enrichment depends upon the resolution of any related breach of contract claims, an unjust enrichment claim cannot be resolved before the contract claims. *Thomas*, 150 Idaho at 644, 249 P.3d at 837. Whether Trefren presented evidence establishing any claim for unjust enrichment will depend on the district court's resolution of the breach of contract claim on remand. The district court's dismissal of count 3 is vacated and the case is remanded for further proceedings.

C. **The issue of attorney fees is remanded for further proceedings.**

Appellants sought attorney fees at the district court under Idaho Code sections 12-120(3) and 12-121 and Idaho Rule of Civil Procedure 54, and they seek attorney fees on appeal under Idaho Code section 12-120(3). Respondents seek attorney fees on appeal under Idaho Appellate Rules 40 and 41, but have failed to cite a statutory basis for a fee award. The district court did not expressly rule on the issue of attorney fees, perhaps because it dismissed all claims by each party. Appellants are entitled to attorney fees only if they were the "prevailing party" under Idaho Code section 12-120(3) or section 12-121. "In this case, any determination of the prevailing party is 'premature' because the Court does 'not yet know who will prevail in this action.'" *Safaris Unlimited, LLC v. Von Jones*, 158 Idaho 846, 353 P.3d 1080, 1085 (2015) (quoting *Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 621, 226 P.3d 1263, 1268 (2010)). For the same reason, the Court declines to award either party attorney fees on appeal. At the conclusion of this litigation in district court, the court may in its discretion award attorney fees to the eventual prevailing party and may consider, to the extent it deems proper, an award of attorney fees for this appeal. *Id.* at 851, 353, P.3d at 1085.

V.
CONCLUSION

We affirm the judgment of the district court, save and except the dismissal counts 1 and 3 of the counterclaim, which we vacate and remand to the district court for further proceedings. Neither party is awarded attorney fees on appeal. Costs to Appellants.

Justices EISMANN, BURDICK, W. JONES and HORTON CONCUR.

Exhibit 2

of interest in Real Homes, LLC."
Q. And what's the date on that, just below that word?
A. January 2006.
Q. And the fax header at the top there, what does that say?
MR. FUHRMAN: I'm going to object to him introducing evidence from this exhibit. Can I ask a question in aid of objection?
THE COURT: You may.

VOIR DIRE EXAMINATION
BY MR. FUHRMAN:
Q. Mrs. Rice, do you recall I took your deposition?
A. Yes, I do.
Q. I don't recall the exact date. I'll figure that out right now. November 19, 2012.
A. Probably.
Q. Do you recall I asked you a question about your knowledge of what we're calling the Real Homes, Real Properties transaction?
A. Yes, I do.
Q. And did you tell me that you were out of the country when that deal --

A. Normally, I do so much traveling, Roy would tell me about the transactions after the fact. And the reason --
Q. The only thing you know about it is what Roy told you about it?
A. Right. And also, of course, I became acquainted with it through the years with this trial.
Q. Okay. I took your deposition in November of 2012. Correct?
A. If that's what it was.
Q. And at that time you told me all you knew was you bought some foreclosure property, and you knew nothing else about it.
A. That's probably correct.
Q. Is that probably true?
MR. FUHRMAN: Thank you.
THE COURT: Well, again, I'll allow --
MR. FUHRMAN: Your Honor, the objection was lack of foundation. She wasn't involved in the preparation or creation of this document or the negotiation that led to this document.
MR. BECKER: Your Honor, we're in a legal malpractice case. Mr. Sallaz sold his clients his ex-wife's house during his divorce trial. They

suffered damages --
THE COURT: Hold on, hold on.
MR. FUHRMAN: I'm going to object to the type of objection or commentary.
THE COURT: Let's approach, please, counsel.
(Bench conference.)
Q. BY MR. FUHRMAN: Ms. Rice, that document you have in front of you, you were involved in litigation in Canyon County with Mr. Sallaz. Correct?
A. Correct.
Q. And do you understand that it concerned this document?
A. Yes.
Q. And what did the Canyon County litigation deal with specifically on this document?
A. As to -- it's my understanding as to what right Mr. Sallaz had in selling us the property, as supposedly he wasn't the only true owner of the property.
MR. SMITH: To which, Judge, I'm going to object. That's speculation. There has been a decision by the judge in Canyon County that Mr. Sallaz and Mr. Frehner weren't the only

members of ownership.
MR. BECKER: Speaking objection.
MR. SMITH: I move that her answer be stricken as if, in fact, she said that she participated. She knows better.
THE COURT: Hang on just a moment. Well, I'll overrule this objection. You can proceed along these lines subject to, as we discussed before, prior to admission of the exhibit, you'll need to lay additional foundation.
Q. BY MR. BECKER: Would you turn to I believe the third page there.
A. Okay.
Q. Where it says "buyer" and below where it says "Real Properties LLC."
A. Correct.
Q. Do you see a signature there?
A. Yes.
Q. Whose signature is that?
A. Eugene L. Rice.
Q. Is that Roy Rice, the husband?
A. Yes.
Q. Have you seen Mr. Dennis Sallaz's signature before?
A. Yes.

Q. Where it says "sellers," do you see another signature line for Dennis Sallaz?
A. Yes. There's one for Dennis Sallaz as co-owner.
Q. And so is that Mr. Sallaz's signature?
A. I have no way of knowing. I suppose it is
MR. FUHRMAN: Objection. Move to strike that last comment, Your Honor.
THE COURT: I will grant that motion. I'll strike the last comment "I suppose it is." The jury will disregard that particular comment. The witness testified she had no way of knowing.
Q. BY MR. BECKER: Based on observing Mr. Sallaz's signature in the past, does this look like Mr. Sallaz's signature?
MR. FUHRMAN: Same objection, Your Honor. She already just testified she doesn't know.
THE COURT: I will overrule that objection. Counsel can try to lay more foundation as to her familiarity with Mr. Sallaz's signature.
THE WITNESS: Okay. What was the question?
MR. BECKER: Can you read back the record, please?
(Question read.)

THE WITNESS: Yes.
Q. BY MR. BECKER: And were you stand by Mr. Sallaz in the Canyon County case?
A. Yes.
Q. Was it in relation to this document right here?
A. Correct.
MR. BECKER: I move for the admission of Exhibit 1A.
MR. FUHRMAN: Objection, lack of foundation.
MR. SMITH: And I join in that objection, Your Honor. And if we could have Mr. Becker speak up, the jury I know cannot hear him. I can't even hardly hear him.
THE COURT: I'm going to sustain the objection. I don't think there's adequate foundation at this point.
MR. BECKER: I'll try a little more.
Q. BY MR. BECKER: Do you know the name of a company called Real Properties, LLC?
A. Yes, I do.
Q. How do you know of that name?
A. That's the corporation that we formed, my husband and I.
Q. With the aid of who?

A. With the aid of I believe it was John Ranft and yourself.
Q. Wouldn't that have been Ada Properties?
MR. FUHRMAN: Objection, leading.
Q. BY MR. BECKER: Real Properties, LLC. Jamel, I know this gets confusing.
MR. FUHRMAN: I'm going to object to leading questions, Your Honor.
THE COURT: I'll overrule that particular objection.
THE WITNESS: Okay. What are you wanting me --
Q. BY MR. BECKER: Real Properties, LLC. I know there's a few LLC's that come in bulk in this, but this contract here, we're looking at the January 6, 2006 contract. Do you see the name Real Properties, LLC buyer?
A. Yes, I do.
Q. Was that your company?
A. Yes, it was.
Q. And did Mr. Sallaz help you form that?
A. I believe so.
Q. And did you ultimately become a member manager of Real Properties, LLC?
A. Yes, I did.

Q. And was Real Properties, LLC a named party in the Canyon County litigation?
A. Yes, it was.
Q. Let's look at page 2 of this document.
MR. FUHRMAN: Your Honor, as a way of a heads up, this has not admitted, and I'm going to object to any attempt to read out of this and ask Ms. Rice if that's what it says.
MR. BECKER: I'm trying to lay foundation for her familiarity w/in this document.
THE COURT: I agree that that's what you need to do, but I think you need to be careful of reading the document into the record as a means of doing that.
Q. BY MR. BECKER: Do you recall paying Dennis Sallaz some money out of a line of credit?
A. Yes, I do.
Q. About how much was that?
A. I believe there was $10,000, and then there was $63,000.
Q. Relating to this document here?
A. Yes.
Q. And Real Homes, LLC, whose corporation was that before this sale?
MR. SMITH: To which I object to the form of

may be published to the jury.
(Defense Exhibit 259 admitted.)
Q. BY MR. BECKER: On this lis pendens where it says "Please take notice," do you see that?
A. Yes, I do.
Q. Who is filing this lis pendens according to that declaration?
A. I would say the defendants.
Q. Who is the defendant?
A. The defendants are Dennis Sallaz, Glen Trefren, Tradesmen Contractors & Construction.
Q. So your understanding is, it's all the defendants are filing this lis pendens?
A. Yes.
Q. Including Dennis Sallaz.
A. Yes.
Q. And it says they're seeking a recission of a contract. Do you see that?
A. No. On the first page?
Q. Yes, on the second line under "Please take notice."
A. Yes, I do.
Q. That recission of that contract, is

that this Exhibit 1A we've been talking about here, the Real Homes, Real Properties contract?
MR. FUHRMAN: Objection, lack of foundation.
MR. SMITH: And speculation.
THE COURT: Sustained.
MR. BECKER: I move for the admission of Exhibit 1A at this time. We've laid a foundation. She can testify regarding her personal knowledge. It's not hearsay simply because she has a conversation and then comes to understand what a contract is.
MR. FUHRMAN: Same objection, Your Honor. There's other witnesses that might be able to secure the admission of this document. Not this witness, though.
THE COURT: Well, that's my perception of it as well, counsel. I'm not sure there's --
MR. BECKER: It's coming in through other witnesses. I don't understand what all the fuss is about. Let's just stop wasting time and move forward.
MR. SMITH: It remains to be seen if there are other witnesses. At this time an objection has been made and I think appropriately. I would join in the objection.

THE COURT: Sustain the objection. As was indicated, it may well be that foundation may be laid through a different witness.
Q. BY MR. BECKER: So you can't sell the properties right now because of this document. Correct?
MR. FUHRMAN: Objection, leading.
Q. BY MR. BECKER: Can you sell the properties right now, Ms. Rice?
A. No.
Q. Why?
A. Because of a lis pendens.
Q. This lis pendens?
A. Yes.
Q. Would you like to sell the properties?
A. Definitely.
Q. Why is that?
A. Well, it's just costing us money, taxes, upkeep.
Q. How much does the Canyon County case cost you?
A. Probably about --
MR. SMITH: To which I'm going to object as speculation, no foundation whatsoever of her knowledge.

MR. FUHRMAN: In addition, Your Honor, there's no discovery responses addressing anything like this.
MR. BECKER: The counterclaim lays out that we're seeking damages for sums incurred in this Canyon County lawsuit. It specifically lists the amount.
MR. SMITH: Not through this party.
MR. BECKER: She signed the counterclaim.
THE COURT: I'm going to -- there are a couple of different objections. The second one by Mr. Fuhrman, I'm going to overrule that objection. I'm uncertain frankly what the contents of those documents are, but to the extent those can be shown to me later, that may affect the ultimate status of this particular evidence.
I will sustain the original objection by Mr. Smith, which was as to foundation. More foundation could be laid.
Q. BY MR. BECKER: Ms. Rice, you have written checks for attorney fees as a result of this Canyon County case. Correct?
A. Correct.
Q. You have written checks to the court-appointed special master in Canyon County

Correct?
MR. SMITH: To which I'll object to the leading form of these questions once again.
Q. BY MR. BECKER: Did you write checks to the special master in Canyon County?
MR. FUHRMAN: The rate we're going --
MR. BECKER: I'll rephrase.
THE COURT: I considered the prior question to be withdrawn and to be replaced with this new question, but, Mr. Becker, we do need to make every effort to originally frame your questions in a nonleading fashion.
Q. BY MR. BECKER: Did you write checks to the court-appointed special master in Canyon County?
A. Yes, I did.
Q. How much were those checks?
A. Probably right around $4,000 or $5,000.
Q. How much did it cost you to go through trial in Canyon County?
MR. SMITH: And, again, Judge, I'm going to object. This is speculation. She has no knowledge of this. It has been revealed in the deposition she has no knowledge of this.
MR. BECKER: The trial took place after the

deposition. She wrote checks. She just testified to that.
THE COURT: Her deposition testimony can be the subject for redirect. Now, the question was, how much did it cost?
I will sustain the objection for lack of foundation at that point, but foundation as to witness knowledge of that subject can perhaps be laid.
Q. BY MR. BECKER: You wrote checks.
A. Yes, I did. Probably in the amount of $40,000.
Q. Mr. Sallaz was preparing your wills. Correct?
MR. SMITH: I would object to the form of the question.
THE COURT: Sustained.
MR. BECKER: Withdrawn.
Q. BY MR. BECKER: Was Mr. Sallaz preparing your wills?
MR. FUHRMAN: Object, lack of foundation. At what time?
MR. BECKER: Well, we can go to Exhibit -- 569 is already admitted, so let's pull that up here and we'll just go through this.

Q. BY MR. BECKER: We've got Exhibit 569. That is page 90. This is a document produced by Mr. Sallaz.
Do you see this time entry here, the 19th of May?
A. Yes, I do.
Q. Whose name is next to that?
A. Dennis L.W.
Q. Is that Dennis Sallaz?
A. I presume so.
Q. Let's look up at the top here.
A. Sallaz & Gatewood Law Offices.
Q. What does it say Mr. Sallaz was doing on the 19th of May, 2010?
MR. FUHRMAN: Objection, leading. I thought she said she is not sure whose entry that is, if I recollect correctly.
THE COURT: Well, she said -- I believe she said she assumed so. I'll sustain the objection, but the question could be asked -- you can certainly ask the witness what the entry says.
Q. BY MR. BECKER: Mrs. Rice, now that you see that is Sallaz & Gatewood, do you see that?
A. Yes.
Q. The 19th of May, seeing the name

"Dennis," who do you attribute Dennis to at Sallaz & Gatewood?
MR. FUHRMAN: Objection. Calls for speculation, asked and answered.
THE COURT: Overruled.
THE WITNESS: That's the only Dennis I know over there.
Q. BY MR. BECKER: Dennis Sallaz?
A. Correct.
Q. On the 19th of May, 2010, what was he doing according to this bill?
A. Initialed drafts of client and Janet's wills.
Q. How much did he charge you for that?
A. $200.
Q. Times how many hours?
A. Times two, which was $400.
Q. Going back to Exhibit 260. This is that release we were talking about. What's the date there?
A. 2nd day of August, 2010.
Q. So is it your understanding he was drafting wills while being involved in litigation with you?
A. Apparently.

Mr. Fuhrman, you may cross examine Ms. Rice.

MR. FUHRMAN: Thank you.

JANET RICE,

the witness at the time of the evening recess herein, was examined and further testified as follows.

CROSS EXAMINATION

BY MR. FUHRMAN:

Q. Good morning, Ms. Rice.

A. Good morning.

Q. As yesterday, if you need to take a break, feel free to speak up, and that's fine. I would just ask that if I'm in the middle of a question, that you try and give me an answer before we take a break. Is that fair?

A. Yes, it is.

Q. We've met before. Correct?

A. Right.

Q. I've been in your house looking at documents?

A. Correct.

Q. I took your deposition back in November of 2012?

A. Yes, you did.

Q. I was at your house in part for some of your husband's depositions?

A. Yes, you were.

Q. I'm going to talk to you about a variety of topics really in response to an elucidation of what was discussed yesterday. And I want to start out with what I'm calling the Canyon County properties. Do you recall the questions about those properties yesterday?

A. I believe so.

Q. Do you know what I'm talking about, the parcels owned by Ada Properties?

A. Yes, I do.

Q. And I asked you a question during your direct examination in aid of an objection, and I want you to confirm that for me. Were you not involved in a transaction that led to Ada Properties owning these parcels of property in Canyon County?

A. Now, what do you mean by was I not involved? I don't quite understand the question.

Q. Didn't you tell me in your deposition that you were out of the country when these properties were obtained by Mr. Rice through an

LLC?

A. I believe I was through most of the transactions that have happened.

Q. When you say most of the transactions, what do you mean?

A. I can't say for certain either I was here or he informed me by phone what he had done.

Q. Okay. But you weren't involved in the actual transaction that led to the acquisition of the Canyon County properties, were you?

A. No.

Q. There was some talk about a gentleman named Ivor Longeteig that filed a lis pendens during the pendency of the Canyon County litigation. Do you recall that?

A. Yes.

Q. And do you know who Ivor Longeteig represented?

MR. BECKER: Objection, vague. In which case?

Q. BY MR. FUHRMAN: If you don't know, that's fine.

A. All I know is --

THE COURT: I'm sorry. I'll overrule the objection.

Q. BY MR. FUHRMAN: Did he represent Glenn Trefren in that litigation?

A. I believe so, yes.

Q. And you made some comment about that Dennis Sallaz sued you in Canyon County. Isn't it true that you and your husband sued Dennis Sallaz, Renee Baird, Glenn Trefren, and a couple other LLCs?

A. There has been so much back and forth, I wouldn't tell you for sure.

Q. Weren't you represented by John Kurtz and Mickie Becker in that lawsuit?

A. Yes.

Q. Do you recall that a lis pendens was filed by Mr. Kurtz and Mr. Becker against the properties in that litigation?

A. Not really.

MR. FUHRMAN: Can the witness be handed Exhibit 576, one of the defendant's exhibits, one of the counter defendant's exhibits?

(Handed to the witness.)

Q. BY MR. FUHRMAN: Ma'am, can you take a look at that document. Have you had a chance to look at that, ma'am?

A. Yes.

Q. Is that a copy of a lis pendens that was filed by Mr. Runft and Mr. Becker on behalf of you and your husband?
A. Yes, it is.
MR. FUHRMAN: I move for its admission, Your Honor.
THE COURT: Any objection?
MR. BECKER: No objection.
THE COURT: No objection, Exhibit 576 is admitted.
(Plaintiff's Exhibit 576 admitted.)
(Exhibit published electronically.)
Q. BY MR. FUHRMAN: So, ma'am, are you looking at the document or at the screen?
A. I can look at the document.
Q. Does that show John Runft and a Kahle Becker representing you?
A. Yes, it does.
Q. And below their names it says "attorneys for plaintiffs." I did read that correctly?
A. Yes.
Q. And then it identifies Eugene Rice and Janet Rice and Real Homes and Real Properties as the plaintiffs?

A. Correct.
Q. And the defendants Renee Baird, Dennis Sallaz, Glenn Trefren, Tradesmen Contractors & Construction, LLC?
A. Yes.
Q. Did I read that correctly?
A. Yes.
Q. And there's an alternative count, Eugene and Janet Rice and Real Properties versus -- you have to turn to the second page -- Renee Baird, Dennis Sallaz, Glen Trefren, Tradesmen Contractors & Construction, LLC, and Real Homes. Did I read that correctly?
A. Yes.
Q. Is it true, ma'am, that you were generally not involved in Roy's business deals?
A. Correct.
Q. That's correct?
A. Correct.
Q. I know you have testified that you were the primary person involved with handling at least bank records. Were you the check-writer primarily?
A. On our personal accounts, yes.
Q. If Roy wanted to take a cashier's check

down to D.L. Evans Bank, is that something you might not know about?
A. It's possible, yes.
Q. For instance, he could use pawn shop money to do that, couldn't he?
A. Yes.
Q. Most of his loans and such were made through the pawn shop?
A. I would say half and half.
Q. The other half's personal?
A. Yes.
Q. Do you know how much you and Mr. Rice paid for the Canyon County properties?
A. How much we paid for them?
Q. Yes.
A. The only thing I know is what was taken out of our personal account.
Q. That line of credit document that we saw?
A. That line of credit.
MR. FUHRMAN: Can we show the witness Exhibit 147?
(Handed to the witness.)
Q. BY MR. FUHRMAN: Is that the one that Mr. Becker was asking you about the $10,000 entry

and I think the I guess it's $63,000 entry?
A. Yes.
Q. $59,000, excuse me.
A. Yes, it is.
Q. And that's what you understood you all paid for that?
A. Yes.
Q. And the original is being handed to you if that's easier for you now.
Do you recall, ma'am, getting a title insurance commitment on the Ada County properties in 2006?
A. No, I don't.
MR. FUHRMAN: Can the witness be handed counter defendants Exhibit 512.
(Handed to the witness.)
Q. BY MR. FUHRMAN: Just in context, this document has a date of September 15, 2006. Does that refresh your recollection about whether or not you and/or your husband requested a title insurance commitment on the Canyon County properties?
A. My memory isn't that great as far as dates, because I was just -- I wasn't paying attention that much to the business end of it.

"What?"

"If you were paid back the sums that you have -- out of pocket, would you be willing to rescind the sale?"

"No," is his answer, "simply because this was done as a business thing. This was not done as a loan. This was done as a business venture. Now, if I had done this as a loan, then I would have considered that. But I have done this as a business venture, and it is a very, very good business venture."

That's what he said, not that he bought some pig in a poke and Dennis took him down the primrose path.

He was also asked about, was Denny acting as your attorney? And he said, "He hasn't done much for me lately for the last two years." And this was in 2006.

We asked him that last year in 2013, and he said, "He hasn't done much for me since 2006 at all." That's his testimony.

You have that instruction that talks about a client's perception of whether or not some ongoing relationship continues. Mr. Rice's own testimony is that he didn't have that perception

that there was a continuous relationship since 2006.

There are some questions on the special verdict form about when the Rices knew about any issues with respect to the Canyon County property. Going back -- we kind of jumped over this -- Mr. Rice knew, going into it, that when he testified at trial, he was clear that he had a title commitment report. He relied not on Denny Sallaz, but on his banker, Jim Roanoke from D.L. Evans Bank. He knew about Renee Baird's claim. He wouldn't rescind.

Exhibit No. 512 of ours, I'm going to try to put it up. It's that title commitment that shows Renee Baird's lis pendens on the properties. This is, again, part of the Rice's own files.

In 2007, in the spring, they hired this gentleman, Alex Lopez, to look into the title issues on the real homes/real properties. They transferred the properties to the new LLC, Ada Properties. Mrs. Rice testified to all this. They consulted through Alex with their attorney, or maybe in person. I think, at one point, it looks like Alex went to see Mr. Michael Spink, a real estate lawyer here in town.

This is Exhibit No. 502. It was Sunk bills and letters. Roy Rice doesn't like paying for attorneys, so he didn't hire Mike Spink. And then he hired a real estate broker, Steve Pallesen, in the summer of 2002. And Mr. and Mrs. Rice both testified that Pallesen got the findings of fact and conclusions of law from the divorce proceeding in 2007. It was in the fall. They read it and saw a discussion of Sawtooth, Sumner, that there had been a settlement.

Dennis Sallaz testified that Roy knew about a settlement in 2000, that there had been a settlement, and monies had been paid out from that settlement for Dennis's legal fees and whatever else might have been owing to him by Steve Sumner out of that settlement, which, again, the settlement was in 2000. Payments were made in 2003 and 2005, I believe. And they knew this in 2007. The Rices knew this because it's in the findings of fact and conclusions of law. The instructions you have in: What a reasonable person would know.

Originally, Mr. Rice -- well, I think at one point when he had been questioned by

Mr. Smith said, "Well, I didn't read that part until later."

"When?"

"I don't know."

Well, what's a reasonable person going to do?

In any event, when I questioned him, he said, "Yeah, 2007 is when we got it and when we read it."

Mrs. Rice said that's when they got it, what they read it.

So, plus, if there is they hadn't known that there were issues with regard to Renee Baird's claim on the property. They learned it in 2007 when they hired all of these professionals.

Finally, I want you to really think about this idea about whether or not there was any damage in the real homes/real properties transaction. We put up as exhibits, through Mrs. Rice's assessments, that show the current county tax assessed value of the properties. And total was $217,000.

Exhibit No. 114 is a bank statement from D.L. Evans Bank that show they were out of pocket

about $70,000 when they acquired the properties. The entire price was $250,000, which has never been paid, that they -- so they have about a $70,000 investment.

And then if you look at their Exhibit No. 195, which has an appraisal on the properties, including Renee Baird's home and that parcel, on No. 195, it talks about the value of the Smith Street property. And in 2005, the value was 65,000. In the document we produced, No. 714, which are the assessments, Smith in Nampa is identified as having a $90,000 value.

So I don't really believe this idea that they have improvements in Smith -- I think Mrs. Rice said $100,000. But there's no backup for any of this. They could have provided bills if there were actually $100,000 in improvements. So I think your safe assumption is there was about $20,000 in improvements, perhaps. So they're about $90,000 into it, and they have property worth, at a minimum, 217, 220,000. So they weren't injured by this.

There's also an instruction about -- a reasonable duty. If you get damaged by someone else's acts, you have a duty to take ordinary care to minimize the damage. And what we heard from Mrs. Rice is they don't rent Smith, even though it's totally rentable. They let their friend, Skye Hallett, stay there for free.

How am I doing, Your Honor?

THE COURT: You're about two minutes.

MR. FURRMAN: Okay. Last, about the radio stations, they made a big deal about Exhibit No. 266. We introduced Exhibit Nos. 713 and 714 to give the entire Secretary of State package on the two radio stations.

Well, they're not radio stations. They're corporations that look like they might be involved in TV or radio broadcasting. There's no evidence about what assets they have or anything else, or that they even had radio stations, Western Broadcasting and Capitol Broadcasting. It's clear that Mr. Rice set these two corporations up. He was identified as the incorporator. He's identified as the registered agent. The Vista Pawn address is on all of these documents.

For two years, he's communicating back and forth to Secretary of State's Office. They're saying, "You're deficient on your statement. You need to fix this, and you also need to get an annual statement in."

Roy Rice, whatever the street is on Vista, for Vista Pawn, he's doing this himself. And then he let the two corporations forfeit due to inactivity. He's the one who did that. That is the evidence.

The same instruction No. 17, I think a party must take reasonable steps to minimize damage. If there truly was a loss in 1996 and they knew in 2000 and they didn't bring a suit until 2011, is that reasonable?

So you'll be happy to know I'm going to conclude. I wanted to go through the verdict form with you. But I'm going to let you do that yourselves, come to your own reasonable conclusion.

Again, you promised me to decide this case on the evidence, not sympathy, not because Mr. Rice is in poor health, not because Mr. Salaz is in poor health and what your attorney is -- you to do but based on the instructions. And with that, I thank you.

THE COURT: Okay. We have now heard all of the arguments. I have a few brief closing instructions for you before you may begin your deliberations. This batch of instructions is much, much shorter than the last one.

So I will remind you that the arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or a drawing of straws. If money damages are to be awarded, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award.

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts.

Mr. -- I'm sorry. I've got a little